

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2839/2013

In the Business Rescue application of:-

BAMBANANI FRUITS HOLDINGS (PTY) LTD

Applicant

and

BAMBANANI FARMING OPERATIONS (PTY) LTD

Respondent

HEARD ON:

7 NOVEMBER 2013

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

15 NOVEMBER 2013

I **INTRODUCTION**

- [1] This is an application for the placement of respondent under supervision and business rescue in terms of s 131(4)(a) of the Companies Act, 71 of 2008 ("the Act"), together with ancillary relief. The application has been set down on the opposed roll, but as will be indicated later, the only issue to be considered at this stage is the costs of the application.

THE PARTIES

- [2] Applicant is Bambanani Fruits Holdings (Pty) Ltd. It holds 25% of the shareholding in the respondent company, whilst the remaining 75% shareholding in respondent is held by the Bambanani Workers Black Employee Share Trust, a trust with 50 beneficiaries of whom 35 are employees of respondent. Respondent is cited in the application papers as Bambanani Fruits BEE (Pty) Ltd, but its name was changed prior to the launch of the present application to Bambanani Farming Operations (Pty) Ltd. Applicant dealt with this issue in reply and during oral argument an amendment was sought which application was not opposed. This will be reflected in my order. The business rescue application was opposed by Newsa Pack CC (“Newsa”), a creditor of respondent and an affected person in relation to respondent as defined in s 128(1)(a) of the Act, which opposition was eventually withdrawn in circumstances to be explained later.

THE ISSUES

- [3] As mentioned applicant seeks an order in terms whereof respondent is placed under supervision and business rescue. In its notice of motion it seeks an order that the costs of the application be paid by any party opposing the application.
- [4] Detailed and voluminous papers have been filed. The notice of motion and founding affidavit with annexures consist of 271 pages. Newsa filed opposing papers dealing with the merits of the application for business rescue and these

together with the replying affidavit and annexures increased the documents to 377 pages.

[5] Mr Snellenburg, who appeared for the applicant, filed extensive heads of argument timeously and in accordance with the rules of practice of this division. No heads of argument were filed on behalf of Newsa. I communicated through my secretary with Newsa's local attorney on Monday, 4 November and Tuesday, 5 November 2013 in order to establish when the heads of argument, which had to be delivered on Friday, 1 November 2013, could be expected. The response on both occasions was that the attorney was waiting for instructions from his instructing correspondent.

[6] On 7 November 2013 when the application was heard, Mr Benade, appeared for Newsa. He was not previously involved in the matter and was not initially briefed to argue the case. He cannot be blamed for not filing heads of argument. He informed me that Newsa was not opposing the business rescue application anymore, but that it sought certain relief from the court and was not prepared to pay the costs of the application. I deem it apposite to quote the draft order handed in from the bar by Mr Benade:

- "1. that the intervening creditor (NEWSA Pack CC) is granted leave to intervene in the winding-up application under case number **2299 / 2013** and is hereinafter cited as a co-applicant the said winding-up application;
2. the winding-up application is removed from the roll, with no order as to costs;

3. the respondent is placed under business rescue in terms of section 131 of the Companies Act, 2008;
4. the winding-up application is suspended until the business rescue proceedings have terminated;
5. should the business rescue be terminated, in that the said business rescue proceedings fail, then in that event, the intervening creditor is entitled to set down the pending winding-up application, on notice to the applicant forthwith;
6. in that event, the intervening creditor is granted leave to supplement its founding affidavit in the winding-up application;
7. no order as to costs is made in regard to the business rescue proceedings and the winding-up application.”

[7] I shall deal with issues raised by Newsa when the factual matrix is discussed, but merely mention at this stage that the crux of the argument before me was about the costs of the business rescue application and nothing else.

THE FACTUAL MATRIX

[8] Insofar as there is no dispute anymore that the respondent should be placed under supervision and business rescue, I do not intend to give a detailed explanation of all material facts, but will concentrate on those that I feel might be relevant in the exercise of my discretion pertaining to the costs of the application.

[9] Respondent is a major role-player in the stone fruit and fruit industry in this country and it even exports stone fruit to

Europe and Africa. It cultivates, distributes and supplies fruit to major chain groups, such as Spar and Pick & Pay.

- [10] Respondent is a black economic empowerment initiative and as I have indicated above, 75% of its shareholding is held by a trust of which the majority of beneficiaries are employees of respondent. It has the support of the Department of Rural Development and Land Reform.
- [11] *Inter alia* due to two severe hailstorms, which caused considerable damage in excess of R16 million, respondent's cash flow was severely put under pressure to such an extent that it is financially distressed as defined in s 128(1)(f) of the Act.
- [12] Respondent is not insolvent. Its movable and immovable property are valued in excess of R30 million, whilst the total debt amounts to just over R17 million. Newsa's claim is R563 669,97 and thus a minute percentage of the total debt.
- [13] On 25 January 2013 Fruit & Veg City – Import and Export (Pty) Ltd t/a FVC International ("Fruit & Veg") brought winding-up proceedings against respondent, but on 28 February 2013 that matter was settled. Respondent had to pay the outstanding amount of the claim in certain instalments.
- [14] During May 2013 the Standard Bank of SA Ltd perfected its security in terms of its general notarial bond. However,

respondent is in the process of engaging Land Bank of South Africa to consolidate and take over the Standard Bank debt.

- [15] On 12 June 2013 Bryoped Fruits CC issued an application for the winding-up of respondent under application no 2299/2013. A month later Fruit & Veg filed an application to intervene as a creditor in the liquidation application by Bryoped, application no 2299/2013. This winding-up application was enrolled at a stage, but postponed from time to time and eventually to 28 November 2013 in anticipation of the outcome of this application.
- [16] On 25 September 2013 Newsa filed a notice of motion in case no 2299/2013 (the winding-up application) requesting leave to intervene in the winding-up application and to intervene and participate as an affected person in terms of the provisions of s 131(3) of the Act in the business rescue application no 2839/2013, which had been issued on 16 July 2013 already. The business rescue application was set down for hearing on 18 July 2013 initially, but postponed to 15 August and then to 26 September. On this day and because of the steps taken by Newsa the matter was postponed to 7 November 2013. Although Fruit & Veg gave notice of intention to oppose the business rescue application, it later withdrew its opposition.
- [17] On 16 October 2013 applicant replied to Newsa's affidavit attached to its aforesaid notice of motion which affidavit was pertinently used to seek an order dismissing the business

rescue application and which dealt with the merits of the application in detail.

- [18] On the morning of 7 November 2013 and prior to going to court, Mr Gerdener of McIntyre & Van der Post attorneys, approached me in chambers and by agreement requested a further postponement of the winding-up application as well as Fruit & Veg's intervening application, which as he informed me, was agreed between the parties to be postponed to 28 November 2013 in anticipation of the outcome of the business rescue application. I granted such orders.
- [19] I informed Mr Benade during the hearing that I could not grant prayers 1 and 2 of his draft order as I had already made orders in that regard in chambers. The order requesting the suspension of the winding-up application is unnecessary due to the provisions of the Act. I also indicated that I was not prepared to grant prayers 5 and 6 as Newsa would be entitled to exercise its rights in this regard whenever the business rescue proceedings fail and/or are terminated.
- [20] Mr Benade informed me that the allegations in the founding affidavit pertaining to the financial assistance provided to respondent and still to be provided by the Department of Rural Development and Land Reform had been verified by Newsa's legal team on Friday, 1 November 2013. As a result of this confirmation obtained Newsa decided not to oppose the business rescue application anymore. According to the founding affidavit an amount of R7,6 million was

already paid over to the account of an appointed strategic partner of respondent to be utilised for and on behalf of respondent and its creditors. Certain amounts have already been paid to creditors, but the largest portion will be paid to creditors in terms of a business plan to be proposed. The Department has committed an amount of R22 million to respondent of which R11 million has been paid (including the R7,6 million referred to above), whilst the balance would have been paid by the end of September 2013. However due to unforeseen circumstances the completion of a due diligence study, which should have been finalised at the end of August 2013, was delayed. According to applicant's papers respondent also expects the proceeds of its crop of fruit and vegetables to yield in excess of R14 million. Harvesting of the fruit will take place between now and February next year.

- [21] Based on the evidence presented by applicant and the confirmation apparently obtained by Newsa from the Department as late as 1 November 2013, it was advised not to proceed with the opposition of the business rescue application.

LEGAL PRINCIPLES

- [22] It is not necessary to deal extensively with the relevant provisions of the Act and the case law pertaining to business rescue. For purposes hereof it is merely required to refer to the recent judgment of the Supreme Court of Appeal in the matter between **Oakdene Square Properties (Pty) Ltd &**

Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others 2013 (4) SA 539 (SCA).

[23] In **Oakdene Square Properties** Brand JA dealt with an argument of counsel to the effect that all the applicant for business rescue has to show, is that a plan to rescue the respondent is capable of being developed and implemented, regardless of whether or not it may fail, as follows in para [31]:

“I do not agree with this line of argument. As I see it, it is in direct conflict with the express wording of s 128(1)(h). According to this section ‘rescuing the company’ indeed requires the achievement of one of the goals in s 128(1)(b). Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process. I have indicated my agreement with the statement in *Propspec* (a judgment by Van der Merwe J in *Propspec Investments v Pacific Coast Investments 97 Ltd* and Another 2013 (1) SA 542 FB paras [11] and [15]) that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b).”

At paragraph [38] Brand JA continued as follows:

“As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose

any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or *mala fide*. By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable."

[24] Mr Benade referred me to the judgment of **Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening)** 2011 (5) SA 600 (WCC) and requested me to consider this judgment when the issue of costs is considered. The judgment does not support Newsa at all. The costs of the intervention application were reserved for later adjudication. I agree with Rogers AJ that although the Act does not contain an express provision for costs incurred in business rescue procedure as is the case with winding-up and sequestration, s 135(3) is probably applicable insofar as it refers to "other claims arising out of the costs of the business rescue proceedings." I am also in agreement with him that the court's inherent jurisdiction in regard to costs applies to business rescue applications.

[25] Neither Mr Snellenburg, nor Mr Benade referred to any other case law dealing specifically with the issue of costs in business rescue applications or for what it is worth,

sequestration and liquidation applications. In terms of s 97(3) of the Insolvency Act, 24 of 1936, the costs of opposition in sequestration proceedings are not included in the costs of sequestration, unless the court directs that they be included. Such orders have been granted in the past on the sole ground that the debtor's opposition was *bona fide* and reasonable. See **Hugo, NO v Lipkie** 1961 (3) SA 66 (O) at 73A and the further case law referred to by **Mars: The Law of Insolvency in South Africa**, 9th ed, para 5.40 at 150. However it appears as if such costs should as a general rule be refused unless special circumstances exist and the debtor had real and substantial grounds for opposing, or because his opposition assisted the court in coming to a decision. See **Slabbert, Verster & Malherbe (Vrede) (Edms) Bpk v Bothma** 1975 (1) SA 232 (O) at 236A and **Lotzof v Raubenheimer** 1959 (1) SA 90 (O) at 94G.

- [26] If other creditors in sequestration proceedings unsuccessfully intervene to oppose the granting of a sequestration order, they should as a general rule bear the costs occasioned by their opposition. (**Robinson v Smerling** 1922 EDL 213.) However the court has on occasions ordered such costs to be paid out of the estate assets. **Jhatam and Others v Jhatam (2)** 1958 (4) SA 187 (N). The court refused to allow costs of an unsuccessful application for intervention which was found to be unnecessary and vexatious. See **Ex Parte Jordaan: In Re Grunow Estates (Edms) Bpk v Jordaan** 1993 (3) SA 448 (O). Section 97(3) of the Insolvency Act

applies to a winding-up by virtue of s 342(1) of the Companies Act, 61 of 1973. Notwithstanding the 2008 Companies Act, Chapter 14 of the 1973 Act is still applicable in certain instances. Therefore, also in the case of companies the costs of an unsuccessful opposition to a winding-up application form part of the costs of liquidation only if the court so orders (s 97(3) of the Insolvency Act). To conclude, the effect of s 97(2)(c) and (3) of the Insolvency Act, read with s 342(1) of the 1973 Companies Act is that the costs incurred by the applicant for the winding-up order are automatically “the taxed costs of liquidation” (unless the court otherwise orders) and the costs of unsuccessful opposition to the grant of the order are costs in the liquidation only if the court so directs. Contrary to an earlier approach that the court should so direct only if the opposition was *bona fide* and reasonable - see for example **Premier Industries Ltd v African Dried Fruit Co (1950) Ltd and Others** 1953 (3) SA 510 (C) at 513 – 514 - more recent authorities are to the effect that the court should so direct only where special circumstances exist. See **Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others** 1976 (2) SA 856 (W) at 868. See also **Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others** 1993 (4) SA 436 (C) at 450 – 451 where the court refused so to direct where it was satisfied that at no relevant time had there been any reasonable prospect of the opposition proving successful.

- [27] In an intervention application where the intervening creditor furnished information which has contributed significantly to

the reaching by the court of its conclusion, the costs of such intervening creditor was found to be costs in the liquidation. See **Confrees (Pty) Ltd v Oeanate Investments (Pty) Ltd (Snoek Wholesalers (Pty) Ltd and Others Intervening)** 1996 (1) SA 759 (C) at 766.

EVALUATION OF THE FACTS AND SUBMISSIONS

[28] I am satisfied that applicant has established grounds for the reasonable prospect of achieving one of the two goals contemplated in section 128(1)(b)(iii), to wit the primary goal which is to facilitate the continued existence of the company in a state of solvency and if it is not possible to so continue in existence, the secondary goal, to obtain a better return for the respondent's creditors and shareholders than would result from its immediate liquidation.

[29] Mr Snellenburg argued that Newsa should be ordered to pay all of applicant's costs of the application. When I indicated to him that this appears to be totally unfair as applicant in any event had to make out a case for business rescue and to achieve that it had no choice, but to deal extensively with respondent's position and the grounds relied upon for business rescue, which it did, he conceded this, but submitted that Newsa should then be ordered to pay the costs of opposition, i.e. all those costs from the notice of opposition, the filing of the further sets of affidavits, the

drafting of the heads of argument and the costs of the opposed application.

[30] He argued that although Mr Benade had made acceptable and forceful submissions, the facts *in casu* did not support these arguments at all. In this regard Mr Benade argued that s 131(3) of the Act provides for participation by affected persons and that Newsa as an affected person merely utilised that right in opposing the application. Therefore it should not be penalised with a costs order even if its opposition fails. Such order will deter other affected persons in future to rely on their right of participation which has been explicitly granted by the legislature. Although I agree that this is an aspect to be considered, I am unable to agree with Mr Benade's submissions, bearing in mind the facts *in casu*.

[31] Newsa acted unreasonable and is directly to be blamed for the increase in costs in this matter. It is a minority creditor and was at all relevant times fully aware of the fact that the applicant in the winding-up application and Fruit & Veg, the other creditor who wants to intervene in that application, as well as all other major creditors, elected not to oppose the business rescue application. Real participation would entail consulting with the major creditors, the Department and applicant at an early stage of the proceedings in order to confirm the true facts.

[32] Furthermore, in its opposing papers Newsa challenged the applicant's averments by relying on speculation and the

casting of suspicion rather to rely on a solid and factual foundation. It went so far to deny that respondent was the owner of the immovable property for which a valuation was attached to applicant's founding affidavit. It even alleged that respondent was no longer trading.

[33] Newsa has satisfied itself now and as late as 1 November 2013 that the Department was serious in assisting respondent financially in accordance with the evidence supplied by applicant in the founding affidavit. This affidavit was filed as long ago as 16 July 2013 and Newsa together with all other affected persons were properly given notice of the intended application to place respondent under supervision and business rescue. Newsa's affidavit in opposition of the application was filed on 25 September 2013, about six weeks ago. If it was really interested in participating it could and should have contacted the Department on receipt of the application papers to ascertain whether there was any truth in the applicant's allegations. This it failed to do until four court days before the hearing of the opposed application. Initially Newsa was guilty of "n groot dosis van swak oordeel" in the words of Kotze J in *ex parte Jordaan supra*.

[34] Newsa did not contribute at all to the decision arrived at by me pertaining to the merits of the application, but worst of all, its unreasonable opposition caused not only unnecessary and wasted costs, but wasted valuable time that could have been utilised by the business practitioner to do his

investigations and to prepare a business plan for submission to creditors. Was it not for the opposition, the business practitioner might have been in the process of wrapping up the business rescue operation by now. It remains a mystery why I was not informed earlier than the morning of the hearing of Newsa's changed attitude and why some respect, or at least the required courtesy, was not displayed. Applicant was unnecessarily drawn into an opposed application and I also had to study the papers and prepare for the hearing.

- [35] There is no reason why applicant should be saddled with the costs incurred since the filing of the notice of opposition. That would effectively be the case if no order as to costs is granted. Mr Snellenburg did not submit that applicant's costs, excluding the costs of opposition, be paid by respondent or that those costs to be costs in the business rescue proceedings. In any event, the notice of motion does not contain an order to that effect and if the matter was unopposed, applicant would in any event not be entitled to any costs. Whether this is an oversight does not have to be considered. If such costs were claimed in the notice of motion I would be inclined to grant such order.

ORDER

- [36] Therefore the following orders are made:
1. Respondent's name is deleted and substituted with Bambanani Farming Operations (Pty) Ltd.

2. Respondent is placed under supervision and business rescue in terms of section 131(4)(a) of the Companies Act, 71 of 2008.
3. Daniël Theodorus van Jaarsveld is appointed as interim practitioner in terms of section 131(5) of the Act.
4. No order as to costs is made, save that applicant's costs pertaining to the opposition of the application by NEWSA Pack CC, i.e. all the costs incurred since 25 September 2013, including the costs of 26 September 2013 which have been reserved, shall be paid by NEWSA Pack CC on the scale as between party and party.

J.P. DAFFUE, J

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